2004

State of Utah v. Robert Carl Terry : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	**Case No. 20040326-CA**
v.	:	
ROBERT CARL TERRY,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL AFTER CONVICTIONS FOR TWO COUNTS OF POSSESSION OF CLANDESTINE LABORATORY PRECURSORS, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 58-37D-4(A) AND 58-37d- 5(a) (West 2004); ONE COUNT OF FAILURE TO RESPOND TO AN OFFICER'S SIGNAL, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 41-6-13.5 (West 2004); AND ONE COUNT OF CARRYING A CONCEALED DANGEROUS WEAPON, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 76-10-504(1) (West 2004), IN THE SECOND JUDICIAL DISTRICT COURT, DAVIS COUNTY, THE HONORABLE GLEN R. DAWSON PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his convictions on two counts of possession of clandestine laboratory precursors, a first degree felony. This Court has pour-over jurisdiction pursuant § 78-2a-3(2)(j) (West 2004).[1]

ISSUES ON APPEAL AND STANDARD OF REVIEW

I. Does defense counsel's decision to forego lesser included offense instructions constitute ineffective assistance where those instructions would have been inconsistent with defendant's all-or-nothing defense at trial?

Defendant raises this claim both as an ineffective assistance claim and a plain error claim. An ineffective assistance of counsel claim raised for the first time on appeal

[1]Although defendant was also convicted on one count of failure to respond to an officer's signal, a third degree felony, and one count of carrying a concealed dangerous weapon, a class B misdemeanor, none of defendant's claims on appeal challenge those convictions. *See* Aplt. Br. at 13-31.

presents a question of law. *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. To establish plain error, defendant must show that trial error occurred, that the error should have been obvious to the trial court, and that he was prejudiced by that error. *See State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186.

II.A. Does defendant's ineffective assistance claim that counsel should have challenged the jury instruction defining possession fail where the instruction is consistent with Utah law?

II.B. Does defendant's ineffective assistance claim that counsel should have challenged the lack of a conspiracy elements instruction fail where defendant provides no evidentiary support for his claim that a different result was reasonably probable had such an instruction been given?

II.C. Does defendant's ineffective assistance claim that counsel should have challenged the intent instruction fail where the statute upon which he relies merely sets out factors a jury *may* consider in determining intent?

The same standard of review applies to these claims as applies to claim I.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutory provisions are attached at Addendum A:

Utah Code Ann. § 58-37-2 (2002);
Utah Code Ann. § 58-37d-3 (2002);
Utah Code Ann. § 58-37d-4 (2002);
Utah Code Ann. § 58-37d-5 (2002);
Utah Code Ann. § 58-37d-6 (2002).

STATEMENT OF THE CASE

Defendant was charged by information with one count of possession of pseudoephedrine, a clandestine laboratory precursor, a first degree felony; one count of possession of iodine, a clandestine laboratory precursor, a first degree felony; one count

of failure to respond to an officer's signal, a third degree felony; and one count of carrying a concealed weapon, a class B misdemeanor (R67-70). After a preliminary hearing, defendant was bound over as charged (R47). Following a jury trial, defendant was convicted on all counts (R114,120).

Before sentencing, defendant filed Defendant's Motion and Memorandum in Support of Motion to Dismiss or for New Trial (R171-84). The trial court denied defendant's motion (R239-47). Defendant then refiled his motion as a motion to arrest judgment (R255-66). The trial court again denied defendant's motion (R292-309).

Defendant then filed a motion to disqualify Judge Michael G. Allphin (R334-40). After an evidentiary hearing before the presiding judge, defendant's motion was denied (R328-30). Defendant was thereafter sentenced to five years to life on each first degree felony count, zero-to-five years on the third degree felony; and six months in jail on the misdemeanor (R332,347-49).

When defendant then filed a motion for new trial, Judge Allphin recused himself (R354-55,405). Defendant's case was reassigned (R420-21). His motion for new trial was denied (R515-16,527-34).

Approximately three months later, defendant filed a rule 65B motion asserting that his right to appeal had been denied and requesting that he be resentenced (R535-37). The trial court granted defendant's motion (R558-59, 560).

A timely notice of appeal was filed (R565-67). The supreme court transferred the matter to this Court for disposition (R577).

STATEMENT OF FACTS[2]

In early 2001, defendant, a small business owner from Wyoming, purchased a Chevrolet Suburban from the Utah Auto Collection, a dealership in Bountiful, Utah. At the time, Jeff Archibald was a manager at the dealership. Defendant paid for the Suburban with cash (R601:25-26).

A few weeks later, in mid-March, Archibald ran into defendant at an automotive shop in Bountiful (R601:27). Archibald was impressed with the late model SS Camaro defendant was driving and asked that defendant take him for a ride (R601:27, 53). During the ride, defendant told Archibald that he could earn some extra cash if he knew anyone who could sell defendant large quantities of iodine or iodized crystals (R601:29). Archibald told defendant that he would see what he could do (R601:29,82,108).

A few days later, Archibald was playing pool at a local pool hall (R601:30). During the game, Archibald asked if anyone knew where he could get some iodine. Archibald explained that he had a friend who wanted to "throw a batch" of methamphetamine ("meth")—i.e., to cook some—and was short 15 pounds of iodine (R601:30,147). Mark Shaffer, a fellow pool player who was also a government informant, indicated that he could get some (R601:31,80-81,83, 99-107).

Within a day or two, Shaffer telephoned Archibald and put him in contact with a man named "Jason," who was actually an undercover narcotics agent from the West

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[2] The facts are set forth in the light most favorable to the jury's verdict. *See State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346.

Valley Police Department (R601:132-33). Jason told Archibald that he had both iodized crystals and pseudoephedrine to sell (R601:31-32,85,115-16,152). Jason recalled that Archibald seemed familiar with some of the lingo surrounding the two precursors and their connection to meth production. (R601:132-33).

The initial contact between Jason, Shaffer, and Archibald was followed by a brief meeting at a local gas station in which Jason showed Archibald a sample of the precursors he had for sale and confirmed that Archibald's customer was serious about buying them (R601:86, 119-20). During the meeting, Archibald asked Jason whether Jason had access to other forms of iodine in larger quantities (R601120-21). When Shaffer later told Archibald that he wanted an ounce of methamphetamine back after everything was done, Archibald responded, "No problem" (R601:112).

Archibald then telephoned defendant, who decided to purchase ten pounds of iodine and four cases of pseudoephedrine from Jason (R601:33, 83-84). The agreed-upon price for iodized crystals would be $300 a pound; the price for the pseudoephedrine was $2,200 per case (R601:124.153). The total price for both meth precursors, then, would be $11,800 (R601:33,153). Completion of the sale would take place the following Wednesday at 8:00 p.m. at the old Five Points Mall in Bountiful (R601:34,36,89,124, 127,153).

Shortly before 8:00 p.m. on that Wednesday, Archibald met defendant at the Bountiful Bubble Swimming Pool (R601:35,166). Defendant asked Archibald where the

sale was to take place and then gave Archibald two clear plastic packages of money (R601:35-36). Archibald then drove over to the Five Points Mall (R601:36).

When Archibald arrived, Shaffer and Jason were waiting for him (R601:90). Archibald handed Jason the plastic packages defendant had provided him (R601:91,127). After Jason finished counting the money, he took Archibald to the back of the vehicle where the chemicals were located (R601:91-92,128). Archibald told Jason that his friend was close by and that Archibald wanted to take the chemicals over to him and then return the cooler later (R601:129). Archibald also indicated that his friend was interested in buying kegs of iodine from Jason every other week or so (R601:129). At that point, Jason gave the signal for Archibald to be arrested (R601:37-38,129).

Shortly after the scene was cleared of people, an agent in an unmarked police car—who had been told that a person from Wyoming was the actual buyer in the case—observed defendant driving his Wyoming-registered silver Camaro slowly by the Five Points Mall sale sight (R601:184). As the agent followed defendant's Camaro, the agent requested that marked police vehicles assist him in executing a stop on it (R601:171,184). Four marked police cars soon joined the agent and, turning on their overhead emergency lights, attempted to stop the Camaro (R601:172-73,186). When the Camaro slowed down, the officers in the marked police cars stopped their vehicles and ordered defendant to come to a complete stop (R601:173). Instead, defendant leaned out the driver's side window, asked the officers what was going on, "punched the gas and just drove down the street quickly" (R601:174-76,186).

Six blocks later, defendant finally pulled off to the side of the road and stopped (R601:176). The gas tank in defendant's car registered empty (R601:194). When asked why he decided to stop, defendant "said something about because of the number of police that he saw behind him" (R601:178).

After defendant was arrested, officers searched both him and his Camaro (R601:187-91). On defendant's person, officers found $2,204 in cash (R601:191). On the front passenger seat of defendant's car, officers found a radio frequency detector (R601:189-90, 194). On the back seat, they found a case containing a .45 caliber semi-automatic handgun and two loaded magazines, one of which was in the gun (R601:190-91). Finally, under the front passenger seat, officers found a sack of sharp spikes used to deflate tires (R601:188). At the time of the search, the sack seemed caught under the seat, with one of the spikes caught in the carpet (R601:192).

Defendant initially denied knowing Archibald when asked by police (R601:201, 203). Later, however, defendant admitted not only that he knew Archibald but that he had met Archibald at the Bubble earlier that evening and had given Archibald some money during that meeting (R601:201,203). Defendant claimed that the money was for a down payment on a vehicle (R601:201,203).

Shortly thereafter, defendant's properties in Wyoming were searched (R601:206). At defendant's home, officers found numerous chemicals associated with the manufacture of methamphetamine, including hydrogen peroxide, tincture iodine, acetone, Toluol, Toluylene, muriatic acid, and red devil lye (R601:210-13,217-18). Officers also found

surveillance equipment around the home, including a camera deployed in a tree in defendant's yard (R601:209).

Archibald entered into a plea agreement with the State shortly before defendant's trial (R601:38, 40, 49). In exchange for Archibald's testimony against defendant, Archibald's original second-degree felony charges of possession of a controlled substance precursor were reduced to third degree felonies (R601:40). In addition, upon successful completion of probation, Archibald could apply to have the felony convictions reduced to misdemeanors (R601:40).

SUMMARY OF THE ARGUMENT

Issue I. Defendant claims that reversible error occurred in his case because the jury was not instructed on lesser included offenses of possession of a clandestine laboratory precursor. Defendant raises his claim both as an ineffective assistance of counsel claim and as a plain error claim.

To demonstrate ineffective assistance of counsel, defendant must show both that his counsel performed deficiently and that he was prejudiced by counsel's deficient performance. To demonstrate the first prong of the test, defendant must overcome the presumption that, under the circumstances, counsel's actions may be considered sound trial strategy. If any sound strategic basis exists for counsel's action, defendant's ineffective assistance claim fails.

To establish plain error, defendant must show that an error occurred, that the error should have been obvious to the trial court, and that the error was prejudicial. This Court,

however, will not consider a plain error claim where defense counsel strategically chose not to raise the issue below or otherwise led the trial court into the alleged error.

In this case, the defense at trial was that defendant was completely innocent of the possession charges. Lesser included offense instructions would have been inconsistent with this all-or-nothing defense. Defense counsel, therefore, had a sound strategic reason for not requesting such instructions. Under such circumstances, both defendant's ineffective assistance and his plain error claims fail.

Issue II.A. Defendant claims that his counsel was ineffective for failing to challenge the jury instruction defining possession in the context of his possession charges. Defendant raises his claim both as an ineffective assistance of counsel claim and as a plain error claim.

Because defendant affirmatively approved of the jury instruction below, defendant has waived any plain error challenge to the instruction on appeal. Defendant's ineffective assistance claim fails because defendant cannot show deficient performance where the instruction was consistent with Utah law.

Issue II.B. Defendant claims that his counsel was ineffective for failing to request a jury instruction defining the elements of conspiracy where one of the theories upon which his possession charges rested was that he had "conspired with or aided another to engage in a clandestine laboratory operation." Defendant raises his claim both as an ineffective assistance of counsel claim and as a plain error claim.

As previously stated, to establish ineffective assistance, defendant must show both that his counsel performed deficiently and that he was prejudiced by that deficient performance. However, if defendant has not established that he was prejudiced by counsel's performance, this Court need not decide whether counsel's performance was deficient. Failure to establish prejudice also defeats any plain error claim because it too requires a showing of prejudice.

In this case, defendant's claims fail because he has not demonstrated prejudice. Specifically, defendant provides no evidentiary support for his claim that he was prejudiced by the lack of a conspiracy elements instruction. Thus, his claim of prejudice is purely speculative. Such speculation does not support either an ineffective assistance or a plain error claim.

Issue II.C. Defendant claims that his counsel was ineffective for failing to request an additional jury instruction on intent in connection with his possession charges. Defendant contends that, because the instructions did not include circumstances identified by statute "under which the jury, as the trier of fact, may infer [intent]," the instructions were incomplete and inaccurate. Defendant raises his claim both as an ineffective assistance of counsel claim and as a plain error claim.

Because defendant affirmatively approved of the intent instructions below, defendant waived any plain error challenge to those instructions. Defendant's ineffectiveness claim fails because nothing in the cited statute—which merely sets forth a non-exclusive list of circumstances under which a jury may infer an intent to engage in a

clandestine laboratory—mandates that it be given as an instruction in all cases where intent to engage in a clandestine laboratory is an element.

ARGUMENT

I. DEFENSE COUNSEL'S DECISION TO FOREGO LESSER INCLUDED OFFENSE INSTRUCTIONS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE WHERE SUCH INSTRUCTIONS WOULD HAVE BEEN INCONSISTENT WITH DEFENDANT'S ALL-OR-NOTHING DEFENSE AT TRIAL

Defendant claims that his convictions for possession of clandestine laboratory precursors must be reversed. Aplt. Br. at 13-22. Specifically, defendant asserts that "[t]rial counsel's failure to request jury instructions on the lesser included offenses of possession of a controlled substance precursor . . . fell below an objective standard of reasonable professional judgment," and that he was prejudiced by counsel's failure. Aplt. Br. at 15, 20. "In addition," defendant claims, "the trial court committed plain error by failing to charge the jury with respect to the aforementioned lesser included offenses." Aplt. Br. at 20. Defendant's claims fail, first, because he has not shown that he had a right to lesser included offense instructions in this case. Defendant's claims fail, second, because he has not overcome the presumption that counsel's decision to forego such instructions, even if available, was sound trial strategy.

To establish ineffective assistance of counsel, defendant must demonstrate both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgement," and that "counsel's deficient performance was prejudicial -- i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT

76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)); *see also State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citations omitted). To prevail on the first prong of this test, "'[d]efendant must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'" *Moench v. State*, 2004 UT App 57, ¶ 21, 88 P.3d 353 (quoting *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)) (additional citations and quotation marks omitted).

To establish plain error, defendant must show "'(i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error was harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the [defendant].'" *State v. Nelson-Waggoner*, 2004 UT 29, ¶ 16, 94 P.3d 186, 497 Utah Adv. Rep. 23 (quoting *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993)).

A. Defendant's claims fail because defendant has not shown that he had a right to lesser included offense instructions in this case.

Defendant's claims rest on the premise that, had they been requested, the trial court would have been required to give lesser included offense instructions in this case. *See* Aplt. Br. at 16-19. Because defendant provides no factual support for his premise, his ineffective assistance and plain error claims based on that premise fail.

Under well-established law, lesser included offense instruction requested by a defendant must be given if:

> (1) the two offenses are related because some of their statutory elements overlap, and the evidence at trial of the grater offense

> involves proof of some or all of those overlapping elements; and (2) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting the defendant of the lesser-included offense.

State v. Kell, 2002 UT 106, ¶ 23, 61 P.3d 1019; *see also State v. Baker*, 671 P.2d 152, 157-59 (Utah 1983).

Consequently, the propriety of a lesser included offense instruction in any given case depends on the evidence presented at trial. *See State v. Kruger*, 2000 UT 60, ¶ 12, 6 P.3d 1116 ("When a lesser included instruction is requested by the defendant, the trial court must apply an 'evidence-based' standard to decide whether the instruction is appropriate.").

Here, neither defendant's Statement of Facts nor his argument provides any statement of the evidence produced at trial. *See* Aplt. Br. at 6-8, 13-22. Consequently, defendant provides no evidentiary support for his assertion that, if requested, lesser included offense instructions would have been appropriate here. *Cf.* Utah R. App. P. 24(a)(9) (providing that appellant's brief "shall contain . . . citations to the authorities, statutes, *and parts of the record relied on.*") (emphasis added); *see also State v. Gomez*, 2002 UT 120, ¶ 20, 63 P.3d 72 (reiterating that "a reviewing court . . . is not simply a depository in which the appealing party may dump the burden of argument and research") (citations and internal quotation marks omitted); *State v. Garner*, 2002 UT App 234, ¶ 12, 52 P.3d 467 (stating that, "[w]hen a party fails to offer any meaningful analysis, [the Court will] decline to reach the merits").

Absent a showing that this was an appropriate case for lesser included offense instructions, defendant has failed to "'identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'" *Moench*, 2004 UT App 57, ¶ 21 (citations omitted). Thus, defendant has failed to meet the first prong of the *Strickland* test defining ineffective assistance of counsel. *See, e.g.*, *State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

Similarly, absent a showing that lesser included instructions, if requested, would have been mandated, defendant cannot demonstrate error, let alone obvious error, in the trial court's failure to sua sponte give them. *See Nelson-Waggoner*, 2004 UT 29, ¶ 16 (holding that defendant must show obvious error to prevail on plain error claim).

Consequently, defendant's ineffective assistance and plain error claims based on the premise that lesser included offense instructions were required in this case fail.

B. Alternatively, defendant's ineffective assistance claim fails because, given defendant's "all or nothing" defense, counsel had strategic reasons for not requesting lesser included offense instructions.

Assuming arguendo that lesser included offense instructions were available here, defendant's ineffectiveness claim nonetheless fails because defendant cannot show that his counsel performed deficiently in not requesting such instructions.

As discussed above, to prevail on an ineffective assistance of counsel claim, defendant must show both that his counsel "rendered deficient performance which fell

below an objective standard of reasonable professional judgment" and that "counsel's deficient performance prejudiced him." *Chacon*, 962 P.2d at 50 (citations omitted); *see also Strickland*, 466 U.S. at 687. To demonstrate the first prong of that test, defendant must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." *Litherland*, 2000 UT 76, ¶ 19 (citations and internal quotation marks omitted). This Court "will not question such [action] unless there is *no* reasonable basis supporting [it]." *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996) (quoting *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)) (emphasis added).

A claim that trial counsel performed deficiently, therefore, must rest on more than mere failure to object when counsel had a basis to do so. Defendant must also show that counsel's decision not to object had "no reasonable basis supporting [it]." *Crosby*, 927 P.2d at 644 (citation omitted). *See, e.g.*, *State v. Pecht*, 2002 UT 41, ¶¶ 40-44, 48 P.3d 931 (holding failure to object to evidence of defendant's prior incarcerations was not deficient performance where omission was part of trial strategy); *State v. Bullock*, 791 P.2d 155, 159-60 (Utah 1989) (holding failure to object to arguably inadmissible testimony was not deficient performance where trial strategy was to "mount[] an effective attack on [the witness's] motives and methods," and "present[] countervailing testimony" so as to "attack the quality of the State's evidence"); *State v. Bloomfield*, 2003 UT App 3, ¶ 31, 63 P.3d 110 (holding failure to object to admission of evidence offered without adequate foundation was not deficient performance where counsel "used it as part of his trial strategy"); *State v. Villarreal*, 857 P.2d 949, 955-56 (Utah App. 1993) (holding

failure to object to arguably inadmissible evidence was not deficient performance where "counsel apparently elected not to object . . . in order to pursue the trail strategy of attacking the [State's] investigation"), *aff'd by* 889 P.2d 419, 427 (Utah 1995).

Here, defendant's deficient performance claim rests solely on his contention that, because lesser included offense instructions were supported by the evidence here, defense counsel performed deficiently in not requesting them. *See* Aplt. Br. at 13-20.

However, numerous tactical reasons explain why counsel may chose to forego such instructions. For example, counsel "may choose not to request instructions on lesser included offenses as a matter of trial strategy, . . . in the belief that he can defeat the greater charge, but might not be able to defeat a lesser included offense." *State v. Howell*, 649 P.2d 91, 94 (Utah 1982) ("Indeed, a defendant for that reason may even oppose instructions on lesser included offenses . . . in the hope of escaping all criminal liability.").

Alternatively, counsel may reasonably forego requesting lesser included offense instructions because such instructions are inconsistent with the "all or nothing" defense presented at trial. *See, e.g., State v. Hall*, 946 P.2d 712, 723 (Utah App. 1997) (rejecting ineffective assistance claim alleging failure to request lesser included offense instructions where "counsel's request for instructions on lesser included offenses would have been inconsistent with [trial strategy]"); *State v. Perry*, 899 P.2d 1232, 1241 (Utah App. 1995) (same).

Defendant himself may well choose such an all-or-nothing strategy and instruct defense counsel not to request lesser included offense instructions." *See State v. Valdez*, 19 Utah 2d 426, 428, 432 P.2d 53, 54 (1967) ("Sometimes as a matter of trial strategy a defendant desires to have his case submitted to the jury upon the basis of the greater offense only and to risk 'all or nothing' on the outcome.");

In this case, the defense strategy was to present an "all or nothing" defense (R601:22-23 (asserting in opening statement that the jury would find the State's two main witnesses "totally unbelievable" and that the case against his client "is smoke and mirrors"); R601:229 (arguing in closing argument that the State's case against defendant is "just smoke and mirrors"); R.601:240 (arguing in closing argument that "the only thing you have to link [defendant] to any of that in this case is these two individuals, which apparently counsel is willing to concede, didn't testify truthfully here")).

Therefore, counsel's strategy was not that, if defendant was guilty of any crime, it was only a lesser included one. Rather, counsel's strategy was to deny defendant's involvement in any criminal activity at all. Such a defense may well be a sound one. *See Howell*, 649 P.2d at 94; *Valdez*, 432 P.2d at 54.

Moreover, because lesser included offense instructions would have been inconsistent with that strategy, counsel's decision to forego such instructions was also sound. *See Hall*, 946 P.2d at 723 (rejecting ineffective assistance claim where "[d]efense counsel argued throughout trial that A.C. was lying about the alleged abuse"); *Perry*, 899 P.2d at 1241 (rejecting ineffective assistance claim where "[t]rial counsel's strategy

below was to claim misidentification, or alternatively, to demonstrate that the State had failed to show any aggravation, not that defendant was involved in a lesser crime of aggravated assault").

Consequently, defendant cannot demonstrate that counsel performed deficiently in making that decision. *See Crosby*, 927 P.2d at 644 (holding court will not question counsel's strategic decisions "unless there is no reasonable basis supporting them") (citation and internal quotation marks omitted).

Defendant's ineffective assistance of counsel claim therefore fails. *See Chacon*, 962 P.2d at 50; *Strickland*, 466 U.S. at 687.

C. Trial counsel's sound strategic reason for foregoing lesser included offense instructions defeats defendant's plain error claim.

Because defendant's counsel had a sound strategic reason for not requesting lesser included offense instructions, this Court should not reach defendant's plain error claim.

First, established law suggests that a trial court never commits plain error in not sua sponte giving lesser included offense instructions. *See, e.g., State v. Mitchell*, 3 Utah 2d 70, 75, 278 P.2d 618, 621 (1955) (rejecting prior dicta suggesting that "'[i]t [is] the duty of the court to charge upon the subject, whether requested so to do or not'") (citation omitted); *State v. Whiteman*, 2000 UT App 283 (unpublished, attached at Addendum B) ("It is long settled that a defendant has a choice whether to seek a lesser-included instruction, and the court has no independent duty to give such an instruction if not requested."). Any other result, the courts explain, would "allow one to sit by and

deliberately refuse to request instructions as to lesser offenses, with positive assurance of another trial if his client be convicted of the charge against him." *Mitchell*, 278 P.2d at 621; *see also Valdez*, 432 P.2d at 54 (holding defendant "cannot thus elect to make no request as to lesser included offense, with a reservation in mind that if he is convicted he can claim error and obtain a new trial"); *Whiteman*, 2000 UT App 283 ("[W]ere we to find this strategic choice to fall under the plain error or manifest injustice doctrines, defendants in all cases could gamble that the jury would acquit, then appeal the failure to instruct as a manifest injustice should they lose."); *see also Litherland*, 2000 UT 76, ¶ 32 ("It is generally inappropriate for a trial court to interfere with counsel's conscious choices.").

To the extent these cases suggest a blanket rule, defendant's plain error challenge to the absence of lesser included offense instructions fails. Even if they do not suggest such a blanket rule, defendant's plain error claim fails under traditional invited error analysis.

To establish plain error, defendant must show that an error occurred, that it should have been obvious to the trial court, and that the error was prejudicial. *See Nelson-Waggoner*, 2004 UT 29, ¶ 16. However, this Court "will decline to consider a defendant's plain-error arguments if the alleged errors reasonably resulted from defense counsel's 'conscious decision to refrain from objecting.'" *Hall*, 946 P.2d at 716 (quoting *State v. Bullock*, 791 P.2d 155, 158-59 (Utah 1989)).

As discussed above, *see* pp. 14-18 *supra*, the lack of lesser included offense instructions "reasonably resulted from defense counsel's 'conscious decision to refrain from [requesting them].'" *Id.* (citation omitted). Thus, this court should "decline to consider . . . defendant's plain-error argument" here. *Id.*

II.A. DEFENDANT'S INEFFECTIVE ASSISTANCE CHALLENGE TO THE JURY INSTRUCTION DEFINING POSSESSION FAILS BECAUSE THE INSTRUCTION IS CONSISTENT WITH UTAH LAW

Defendant claims that his trial counsel "rendered ineffective assistance of counsel by failing to object to Instruction No. 33, which was utilized to instruction the jury concerning constructive possession." Aplt. Br. at 23 (footnote omitted). Defendant claims the instruction was erroneous because, "[a]ccording to the evidence presented in the instant case," the State "could not have proven that Mr. Terry constructively possessed the controlled substance precursors." Aplt. Br. at 24.[3]

To the extent defendant's claim challenges the jury instruction defining constructive possession, defendant's claim fails because the instruction is consistent with Utah law. To the extent defendant's claim is a sufficiency of the evidence claim, defendant's claim fails because defendant has not marshaled the evidence supporting a

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[3]Defendant asks this Court to also review this claim for plain error. *See* Aplt. Br. at 25. However, because defendant affirmatively approved of this instruction at trial (R601:68), he waived any plain error challenge to that instruction on appeal. *See State v. Pinder*, 2005 UT 15, ¶ 62, 114 P.3d 551 ("A jury instruction may not be assigned as error, even if such instruction would otherwise constitute manifest injustice, 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'") (quoting *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111).

finding that defendant, either as a party to the offense or as a co-conspirator, constructively possessed the precursors.

1. Because the jury instruction defining "constructive possession" was consistent with Utah law, defendant's ineffective assistance claim based on that instruction fails.

Defendant claims that his counsel was ineffective in failing to object to the definition of "constructive possession" contained in Jury Instruction 33. Aplt. Br. at 23. Defendant contends that counsel should have objected to the instruction because it "fail[ed] to accurately instruct the jury on the law applicable to the facts of this case." *Id.* at 25.

In support of his claim, defendant asserts that, "[a]ccording to Utah law, to prove constructive possession there must be a 'sufficient nexus' between the accused and the controlled substance precursors to permit an inference that the accused had both the power and the intent to exercise dominion and control over the controlled substance precursors." Aplt. Br. at 23 (citing *State v. Layman*, 1999 UT 79, ¶ 13, 985 P.2d 911). Thus, "to show constructive possession in the instant case, the State had to prove beyond a reasonable doubt that the controlled substance precursors 'were subject to the defendant's dominion and control and that the defendant had the intent to exercise that control.'" *Id.* at 23-24 (quoting *Layman*, 1999 UT 79, ¶ 16).

The State does not quarrel with defendant's statement of the law concerning constructive possession. However, defendant's claim nonetheless fails because the jury instruction given here was consistent with that law.

In this case, instruction 33 defined "possession" for purposes of defendant's drug charges. That instruction, which included a definition of constructive possession, provided:

> "Possession" The definition of possession does not require that a person be shown to have individually possessed a controlled substance precursor. Rather, it is sufficient if it is shown that the person jointly participated with one or more persons in the possession of a controlled substance precursor with knowledge that the activity was occurring, *or the controlled substance precursor is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.*

(R100) (emphasis added).

This definition of "possession" is identical to the definition of "possession" found in the Clandestine Drug Lab Act. *See* Utah Code Ann. §§ 58-37d-3(2) (2002) (providing that, [u]nless otherwise specified, the definitions in Section 58-37-2 also apply to this chapter"); 58-37-2(dd) (2002) (defining possession).

Moreover, the definition of "constructive possession" contained in the italicized part of the instruction is identical to the definition of "constructive possession" outlined in defendant's brief. *Compare* R100 *with* Aplt. Br. at 23-24.

Consequently, defendant's claim that instruction 33 was erroneous, and that his counsel was therefore ineffective in not challenging it, fails. *See State v. Kelley*, 2000 UT 41, ¶ 26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

2. Any insufficiency of the evidence challenge hinted in defendant's brief fails where defendant has not marshaled the evidence supporting the jury's verdict.

As part of his argument challenging the correctness of instruction 33, defendant contends that the instruction was erroneous because, "[a]ccording to the evidence presented in the instant case," the State "could not have proven that Mr. Terry constructively possessed the controlled substance precursors." Aplt. Br. at 24. To the extent defendant attempts to raise a sufficiency of the evidence claim, this Court should reject it.

"In challenging the sufficiency of the evidence, the burden on the defendant is heavy. Defendant must marshal all evidence supporting the jury's verdict and must then show how this marshaled evidence is insufficient to support the verdict even when viewed in the light most favorable to the verdict." *State v. Lemons*, 844 P.2d 378, 381 (Utah App. 1992) (internal quotation marks and citation omitted); *see also State v. Vessey*, 967 P.2d 960, 966 (Utah App. 1998); *State v. Scheel*, 823 P.2d 470, 472 (Utah App. 1991).

"[T]o properly discharge [this] duty . . . , the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the [defendant] resists." *State v. Coonce*, 2001 UT App 355, ¶ 6, 36 P.3d 533 (citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). "After constructing this magnificent array of supporting evidence, the

challenger must ferret out a fatal flaw in the evidence." *Majestic Inv. Co.*, 818 P.2d at 1315.

Here, defendant marshals none of the evidence supporting the jury's verdicts. Defendant's statement of facts contains no summary of or citation to the evidence elicited at trial. *See* Aplt. Br. at 6-8. And, although defendant's argument addressing his "constructive possession" claim contains two citations to the evidence produced at trial, those citations appear only as parenthetical support for defendant's conclusory statement that, "[a]ccording to the evidence presented in the instant case, no one but the police took possession, either actual or constructive, of the controlled substance precursors." Aplt. Br. at 24 (citing R601:37-38, 129-30).

Defendant's failure to marshal the evidence supporting the jury's verdict defeats any sufficiency of the evidence claim he attempts to raise.

II.B. DEFENDANT'S INEFFECTIVE ASSISTANCE CHALLENGE TO THE LACK OF A CONSPIRACY ELEMENTS INSTRUCTION FAILS WHERE DEFENDANT PROVIDES NO EVIDENTIARY SUPPORT FOR HIS CLAIM THAT A DIFFERENT RESULT WAS REASONABLY PROBABLE HAD SUCH AN INSTRUCTION BEEN GIVEN

Defendant claims that his counsel was ineffective in "fail[ing] to request a jury instruction that accurately defined the conspiracy element [of the possession charges]." Aplt. Br. at 26. Specifically, defendant claims that, because one of the theories upon which the jury was instructed concerning the possession charges was that defendant "'[c]onspired with or aided another to engage in a clandestine laboratory operation,'" the

jury should have been instructed as to the statutory definition of conspiracy "as set forth in Utah Code Ann. § 76-4-201." Aplt. Br. at 25-26. Because defendant has not shown that he was prejudiced by any missing conspiracy instruction, however, defendant's claim fails.[4]

As previously stated, to establish ineffective assistance of counsel, defendant must demonstrate both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgement," and that "counsel's deficient performance was prejudicial -- i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

However, "it is not necessary for [this Court] 'to address both components of the inquiry if [defendant] makes an insufficient showing on one.'" *Parsons v. Barnes*, 871 P.2d 516, 523 (Utah 1994) (quoting *Strickland*, 466 U.S. at 697); *see also State v. Wright*, 2004 UT App 102, ¶ 9, 90 P.3d 644. "When it is 'easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,'" this Court "will do so without

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[4]Defendant also raises this claim under the plain error doctrine. However, because defendant has not established the prejudice necessary to prevail on his ineffective assistance claim, he also has not established the prejudice necessary to prevail on his plain error claim. *See State v. McCloud*, 2005 UT App 466, ¶ 16, ___ P.3d ___ (holding that because both ineffective assistance and plain error claims "require [defendant] to show that he was prejudiced," the inability to show prejudice as to one claim defeats the other); *State v. Ellifritz*, 835 P.2d 170, 174 (Utah App. 1992) (holding that "[w]hen defendant raises the issues of both plain error and ineffective assistance of counsel, a common standard is applicable," and the inability to show prejudice for one claim defeats the other) (citation and internal quotation marks omitted).

addressing whether counsel's performance was professionally reasonable." *Parsons*, 871 P.2d at 523 (quoting *Strickland*, 466 U.S. at 697); *see also Wright*, 2004 UT App 102, ¶ 9.

With respect to the second *Strickland* prong, defendant must show that absent counsel's deficient performance, there is a reasonable probability of a more favorable result. *See State v. Chacon*, 962 P.2d 48, 50 (Utah 1998). Such a showing must be based on a "demonstrable reality and not a speculative matter." *Id.* (citation and quotation marks omitted). Thus, "[i]t is not enough to show that the alleged errors had some conceivable effect on the outcome." *Wright*, 2004 UT App 102, ¶ 15, 90 P.3d 644; *see also State v. Frame*, 723 P.2d 401, 406 (Utah 1986). Rather, defendant "must affirmatively show that there is a 'reasonable probability' that, but for counsel's errors, the result would have been different." *State v. Villarreal*, 857 P.2d 949, 954 (Utah App. 1993), *aff'd*, 889 P.2d 419 (Utah 1995). "[An] invitation to speculate cannot substitute for proof of prejudice." *State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996) (rejecting ineffective assistance claim based on defendant's decision not to testify where "neither the record nor Arguelles' brief indicates what his testimony would have been").

In this case, defendant's claim of prejudice is purely speculative. Although he asserts that "the outcome would have been different" if a conspiracy instruction had been given, defendant provides no evidentiary support for that assertion. *See* Aplt. Br. at 25-28. Defendant's Statement of Facts contains no description of the evidence produced at his trial. *See* Aplt. Br. at 6-8. Nor does the argument section of his brief discussing this issue. *See* Aplt. Br. at 25-28.

Absent any discussion of the evidence produced at trial, defendant cannot—as he must to prevail on an ineffective assistance claim—"affirmatively show that there is a 'reasonable probability' that, but for [the lack of a conspiracy instruction], the result would have been different." *Villarreal*, 857 P.2d at 954.

Consequently, defendant's ineffective assistance claim fails.[5]

II.C. DEFENDANT'S INEFFECTIVE ASSISTANCE CHALLENGE TO THE INTENT INSTRUCTION FAILS WHERE THE STATUTE UPON WHICH HE RELIES MERELY IDENTIFIES FACTORS A JURY MAY CONSIDER IN DETERMINING INTENT

Defendant claims that his counsel was ineffective in failing to object to the jury instructions defining the intent element of his clandestine laboratory operation offenses.

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[5]As a sub-part of his claim, defendant contends that his counsel should also have requested a special verdict form "so that [defendant] . . . could determine which variation the jury relied upon in the course of convicting him of Clandestine Laboratory Precursors and/or Equipment." Aplt. Br. at 26.

In support of this contention, defendant cites *State v. Hopkins*, 1999 UT 98, 989 P.2d 1065. *See* Aplt. Br. at 19. However, Hopkins was convicted of both (1) operating a clandestine methamphetamine laboratory based on a jury instruction that listed multiple theories upon which Hopkins could be convicted, including a theory based on his possession of a controlled substance precursor, and (2) possession of that same controlled substance precursor. *Hopkins*, 1999 UT 98, ¶¶ 1, 27. The State conceded and the supreme court held that, "because no special verdict form was employed, it is possible the jury relied on [the possession of a controlled substance precursor in finding Hopkins guilty of the first crime], which includes all the elements for conviction of possession of a controlled substance precursor." *Id.* ¶ 27. Under such circumstances, the court agreed with the State "that Hopkins is entitled to reversal of his conviction for [the lesser crime of] possession of a controlled substance precursor." *Id.*

In this case, defendant was not convicted both of a greater crime and a potentially lesser included one. Thus, *Hopkins* is inapposite.

In any case, because defendant has not addressed the evidence produced at his trial, defendant also has not shown "a reasonable probability of a more favorable result" had a special verdict form been used. *Chacon*, 962 P.2d at 50.

See Aplt. Br. at 28-30. Defendant contends that, because the instructions did not include "circumstances" identified by statute "under which the jury, as the trier of fact, may infer [intent]," the instructions were "incomplete and thereby [an] inaccurate statement of the elements and relevant law." *Id.* at 29. Because defendant has not shown that the jury was improperly instructed on the issue of intent, however, defendant's claim lacks merit.[6]

To establish ineffective assistance of counsel, defendant must demonstrate both that "counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgement," and that "counsel's deficient performance was prejudicial -- i.e., that it affected the outcome of the case." *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). To prevail on the first prong of this test, "'[d]efendant must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'" *Moench v. State*, 2004 UT App 57, ¶ 21, 88 P.3d 353 (quoting *Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)) (additional citations and quotation marks omitted). Absent such a showing, counsel is presumed to have performed effectively. *See State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92.

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[6]Defendant asks this Court to also review this claim for plain error. *See* Aplt. Br. at 25. However, because defendant did not object to the relevant jury instructions on this basis below (R601:63-67, 70), he waived any plain error challenge to those instructions on appeal. *See State v. Pinder*, 2005 UT 15, ¶ 62, 114 P.3d 551 ("A jury instruction may not be assigned as error, even if such instruction would otherwise constitute manifest injustice, 'if counsel, either by statement or act, affirmatively represented to the court that he or she had no objection to the jury instruction.'") (quoting *State v. Hamilton,* 2003 UT 22, ¶ 54, 70 P.3d 111).

"[T]he general rule is that an accurate instruction upon the basic elements of an offense is essential.'" *State v. Pedersen*, 2005 UT App 98, ¶ 4, 110 P.3d 164 (memorandum decision) (quoting *State v. Pearson*, 1999 UT App 220, ¶12, 985 P.2d 919) (additional quotation marks and citation omitted). Thus, "'[w]hen instructing the jury on the elements of the offense, the trial court must specifically instruct the jury regarding the culpable mental state required to commit the crime.'" *Id.* (quoting *American Fort v. Carr*, 970 P.2d 717, 720 (Utah App. 1998)) (additional quotation marks and citation omitted).

In this case, jury instructions 28 and 29 set forth the elements that the State had to prove before the jury could convict defendant of possession of clandestine laboratory precursors (R91-94). Under those instructions, the jury could only convict defendant if they found that, "as a party," defendant "[k]nowingly or intentionally . . . [p]ossessed a controlled substance precursor with the intent to engage in a clandestine laboratory operation; AND/OR [c]onspired with or aided another to engage in a clandestine laboratory operation" (R91-94). Jury instruction 35 then defined when a person engages in conduct intentionally and when he engages in conduct knowingly (R102).

Jury instructions 28 and 29 were consistent with the intent required for the crime under Utah Code Ann. § 57-37d-4 (1) (2002). Jury instruction 35 was consistent with the statutory definitions of "intentionally" and "knowingly" contained in Utah Code Ann. § 76-2-103(1) and (2) (1999). These instructions on their face, therefore, meet the requirements of *Pedersen*. *See Pederson*, 2005 UT App 98, ¶ 4.

Notwithstanding, defendant claims that these instructions were "incomplete and thereby inaccurate" because they failed to include the language set forth in Utah Code Ann. § 58-37d-6, which identifies a non-exclusive set of circumstances from which "'[t]he trier of fact *may* infer that the defendant intended to engage in a clandestine laboratory operation.'" Aplt. Br. at 29 (quoting Utah Code Ann. § 58-37d-6 (2002)) (emphasis added).[7] Therefore, defendant claims, his counsel performed deficiently in not requesting an additional intent instruction consistent with section 58-37d-6. *Id.*

However, nothing in section 58-37d-6 requires that it be given as an instruction every time a defendant's crime includes as an element the intent to engage in a clandestine laboratory operation. *See* Utah Code Ann. § 58-37d-6.

In fact, the plain language of the statute—which uses the permissive term "may" rather than the mandatory term "shall"—reflects the absence of such a requirement. *See State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795 ("[The] primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the

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[7]Utah Code Ann. § 58-37d-6(2002) provides:

> The trier of fact may infer that the defendant intended to engage in a clandestine laboratory operation if the defendant:
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> (1) is in illegal possession of a controlled substance precursor; or
>
> (2) illegally possesses or attempts to illegally possess a controlled substance precursor and is in possession of any one of the following pieces of equipment:
>
> (a) glass reaction vessel;
> (b) separatory funnel;
> (c) glass condeser;
> (d) analytical balance; or
> (e) heating mantle.

purpose the statute was meant to achieve."); *State v. Coonce*, 2001 UT App 355, ¶ 9, 36 P.3d 533 ("[S]tatutory term[s] should be interpreted and applied according to [their] usually accepted meaning, where the ordinary meaning of the term[s] results in an application that is neither unreasonably confused, inoperable, nor in blatant contradiction of the express purpose of the statute."); *see also State v. Wallace*, 2005 UT App 434, ¶ 18, 536 Utah Adv. Rep. 26 ("Utah courts have long interpreted the word 'may' as permissive, not restrictive."); *State v. Madsen*, 2002 UT App 345, ¶¶ 14-15, 57 P.3d 1134 (interpreting statute providing that "'[p]rior to the imposition of any sentence, the court *may* . . . continue the date for the imposition of sentence . . . for the purpose of obtaining a presentence investigation report'"; holding that "[u]se of the permissive term 'may' plainly indicates that the trial court is not required to continue sentencing to obtain a presence investigation report" but rather merely has discretion to do so).

Moreover, defendant cites no authority requiring that such an instruction be given in all cases despite the statute's permissive language. *See* Aplt. Br. at 28-30.

As a consequence, defendant has not demonstrated that the intent instructions given were incomplete or inaccurate, as he now claims. *See* Aplt. Br. at 29. And, because defendant has not shown that the intent instructions were incomplete or inaccurate, defendant also has not shown that his counsel performed deficiently in not objecting to them. *See Moench*, 2004 UT App 57, ¶ 21 (holding that, to establish deficient performance, "'[d]efendant must identify specific acts or omissions

demonstrating that counsel's representation failed to meet an objective standard of reasonableness.'") (citation omitted).

Consequently, defendant's ineffective assistance claim fails.

CONCLUSION

Based on the foregoing, the State asks this Court to affirm defendant's convictions.

RESPECTFULLY SUBMITTED 15 November 2005.

MARK L. SHURTLEFF
Utah Attorney General

Karen A. Klucznik

KAREN A. KLUCZNIK
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 15 November 2005, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this ***BRIEF OF APPELLEE*** to Scott L. Wiggins, Arnold & Wiggins, P.C., American Plaza II, Suite 105, 57 West 200 South, Salt Lake City, Utah 84101, Attorney for Appellant.

Karen G. Klucznik

Addenda

Addendum A

58-37-2. Definitions.

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in his presence, by his authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(d) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(e) (i) "Controlled substance" means a drug or substance included in Schedules I, II, III, IV, or V of Section 58-37-4, and also includes a drug or substance included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513, or any controlled substance analog.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined or used in Title 32A, regarding tobacco or food;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(f) (i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:

(A) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection; or

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules set forth in this subsection.

(ii) Controlled substance analog does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 366, to the extent the conduct with respect to the substance is permitted by the exemption; or

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance.

(E) Any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription.

(F) Dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(g) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by Title 58, Chapters 37, 37a, 37b, 37c, or 37d, or for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under Title 58, Chapters 37, 37a, 37b, 37c, or 37d.

(h) "Counterfeit substance" means:

(i) any substance or container or labeling of any substance that without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely purports to be a controlled substance distributed by, any other manufacturer, distributor, or dispenser; or

(ii) any substance that is represented to be a controlled substance.

(i) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(j) "Department" means the Department of Commerce.

(k) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of:

(A) barbituric acid or any of the salts of barbituric acid; or

(B) any derivative of barbituric acid which has been designated by the Secretary of Agriculture as habit-forming under Section 502 (d) of the federal Food, Drug, and Cosmetic Act, 21 U.S.C. 352 (d);

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system; or

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(l) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(m) "Dispenser" means a pharmacist who dispenses a controlled substance.

(n) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(o) "Distributor" means a person who distributes controlled substances.

(p) "Drug" means:

(i) articles recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them;

(ii) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;

(iii) articles, other than food, intended to affect the structure or function of man or other animals; and

(iv) articles intended for use as a component of any articles specified in Subsection (i), (ii), or (iii); but does not include devices or their components, parts, or accessories.

(q) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to his dependency.

(r) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food, underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(s) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(t) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(u) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(v) "Marijuana" means all species of the genus cannabis and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant cannabis sativa or any other species of the genus cannabis which are chemically indistinguishable and pharmacologically active are also included.

(w) "Money" means officially issued coin and currency of the United States or any foreign country.

(x) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(y) "Negotiable instrument" means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(z) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(aa) "Opium poppy" means the plant of the species papaver somniferum L., except the seeds of the plant.

(bb) "Person" means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(cc) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(dd) "Possession" or "use" means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that he be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(ee) "Practitioner" means a physician, dentist, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(ff) "Prescribe" means to issue a prescription orally or in writing.

(gg) "Prescription" means an order issued by a licensed practitioner, in the course of that practitioner's professional practice, for a controlled substance, other drug, or device which it dispenses or administers for use by a patient or an animal. The order may be issued by word of mouth, written document, telephone, facsimile transmission, computer, or other electronic means of communication as defined by rule.

(hh) "Production" means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(ii) "Securities" means any stocks, bonds, notes, or other evidences of debt or of property.

(jj) "State" means the state of Utah.

(kk) "Ultimate user" means any person who lawfully possesses a controlled substance for his own use, for the use of a member of his household, or for administration to an animal owned by him or a member of his household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

58-37d-3. Definitions.

(1) As used in this chapter:

(a) "Booby trap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of a person making contact with the device. This term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, nails, spikes, electrical devices, lines or wires with hooks attached, and devices for the production of toxic fumes or gases.

(b) "Clandestine laboratory operation" means the:

(i) purchase or procurement of chemicals, supplies, equipment, or laboratory location for the illegal manufacture of the above specified controlled substances specified in this act;

(ii) transportation or arranging for the transportation of chemicals, supplies, or equipment for the illegal manufacture of specified controlled substances specified in this act;

(iii) setting up of equipment or supplies in preparation for the illegal manufacture of the above specified controlled substances specified in this act;

(iv) illegal manufacture of the above specified controlled substances specified in this act; or

(v) distribution or disposal of chemicals, equipment, supplies, or products used in or produced by the illegal manufacture of specified controlled substances specified in this act.

(c) "Controlled substance precursor" means those chemicals designated in Title 58, Chapter 37c, Controlled Substance Precursor Act, except those substances designated in Subsections 58-37c-3(2)(kk) and (ll).

(d) "Disposal" means the abandonment, discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous or dangerous material into or on any property, land or water so that the material may enter the environment, be emitted into the air, or discharged into any waters, including groundwater.

(e) "Hazardous or dangerous material" means any substance which because of its quantity, concentration, physical characteristics, or chemical characteristics may cause or significantly contribute to an increase in mortality, an increase in serious illness, or may pose a substantial present or potential future hazard to human health or the environment when improperly treated, stored, transported, disposed of, or otherwise improperly managed.

(f) "Illegal manufacture of specified controlled substances" means in violation of Title 58, Chapter 37, Utah Controlled Substances Act, the:

(i) compounding, synthesis, concentration, purification, separation, extraction, or other physical or chemical processing for the purpose of producing methamphetamine, other amphetamine compounds as listed in Schedule I of the Utah Controlled Substances Act, phencyclidine, narcotic analgesic analogs as listed in Schedule I of the Utah Controlled Substances Act, lysergic acid diethylamide, mescaline;

(ii) conversion of cocaine or methamphetamine to their base forms; or

(iii) extraction, concentration, or synthesis of marijuana as that drug is defined in Section 58-37-2.

(2) Unless otherwise specified, the definitions in Section 58-37-2 also apply to this chapter.

58-37d-4. Prohibited acts — Second degree felony.

(1) It is unlawful for any person to knowingly or intentionally:

(a) possess a controlled substance precursor with the intent to engage in a clandestine laboratory operation;

(b) possess laboratory equipment or supplies with the intent to engage in a clandestine laboratory operation;

(c) sell, distribute, or otherwise supply a precursor chemical, laboratory equipment, or laboratory supplies knowing or having reasonable cause to believe it will be used for a clandestine laboratory operation;

(d) evade recordkeeping provisions of Title 58, Chapter 37c, Controlled Substances Precursor Act, or the regulations issued under that act, knowing or having reasonable cause to believe that the material distributed or received will be used for a clandestine laboratory operation;

(e) conspire with or aid another to engage in a clandestine laboratory operation;

(f) produce or manufacture, or possess with intent to produce or manufacture a controlled or counterfeit substance except as authorized under Title 58, Chapter 37, Utah Controlled Substances Act; or

(g) transport or convey a controlled or counterfeit substance with the intent to distribute or to be distributed by the person transporting or conveying the controlled or counterfeit substance or by any other person regardless of whether the final destination for the distribution is within this state or any other location.

(2) A person who violates any provision of Subsection (1) is guilty of a second degree felony.

58-37d-5. Prohibited acts — First degree felony.

(1) A person who violates Subsection 58-37d-4(1)(a), (b), (e), or (f) is guilty of a first degree felony if the trier of fact also finds any one of the following conditions occurred in conjunction with that violation:

(a) possession of a firearm;

(b) use of a booby trap;

(c) illegal possession, transportation, or disposal of hazardous or dangerous material or while transporting or causing to be transported materials in furtherance of a clandestine laboratory operation, there was created a substantial risk to human health or safety or a danger to the environment;

(d) intended laboratory operation was to take place or did take place within 500 feet of a residence, place of business, church, or school;

(e) clandestine laboratory operation actually produced any amount of a specified controlled substance; or

(f) intended clandestine laboratory operation was for the production of cocaine base or methamphetamine base.

(2) If the trier of fact finds that two or more of the conditions listed in Subsections (1)(a) through (f) of this section occurred in conjunction with the violation, at sentencing for the first degree felony:

(a) probation shall not be granted;

(b) the execution or imposition of sentence shall not be suspended; and

(c) the court shall not enter a judgment for a lower category of offense.

58-37d-6. Legal inference of intent — Illegal possession of a controlled substance precursor or clandestine laboratory equipment.

The trier of fact may infer that the defendant intended to engage in a clandestine laboratory operation if the defendant:

(1) is in illegal possession of a controlled substance precursor; or

(2) illegally possesses or attempts to illegally possess a controlled substance precursor and is in possession of any one of the following pieces of equipment:

(a) glass reaction vessel;

(b) separatory funnel;

(c) glass condenser;

(d) analytical balance; or

(e) heating mantle.

Addendum B

H

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Utah.
STATE of Utah, Plaintiff and Appellee,
v.
Michael WHITEMAN, Defendant and Appellant.
No. 990520-CA.

Oct. 13, 2000.

Clark R. Nielsen, Salt Lake City, for appellant.

Jan Graham and Scott Keith Wilson, Salt Lake City, for appellee.

Before GREENWOOD, BILLINGS, and ORME, JJ.

MEMORANDUM DECISION (Not for Official Publication)

BILLINGS.

***1** Defendant appeals his murder conviction. We affirm.

Defendant first argues the trial court erred in failing to grant a new trial based on newly discovered evidence. "[W]e review the decision to grant or deny a motion for a new trial only for abuse of discretion." *State v. Loose,* 2000 UT 11, ¶ 8, 994 P.2d 1237. To be afforded a new trial based on newly discovered evidence, defendant "must demonstrate from the proffered evidence that: '(i) it could not, with reasonable diligence, have been discovered and produced at trial; (ii) it is not merely cumulative; and (iii) it must make a different result probable on retrial.' " *Id.* at ¶ 16 (quoting *State v. Martin,* 1999 UT 72, ¶ 5, 984 P.2d 975).

First, defendant claims to have discovered new evidence of the victim's gang membership. The trial court determined that even had the tattoos allegedly identifying the victim as a gang member been discovered and disclosed prior to trial, the jury's verdict would not have been different. We agree. The defendant himself testified regarding the violent, well-organized groups of Hispanic drug dealers who controlled the drug trade in the park. Other witnesses testified that the drug dealers worked in groups and carried weapons, and that they engaged in violence to protect their territory. Further, there is no evidence that the defendant was aware of either the tattoos or the particular gang affiliation they represented at the time of the homicide and thus this evidence was not particularly probative of his state of mind. We therefore agree with the trial court that evidence of the tattoos would not have made a different result probable.

Defendant also claims to have uncovered additional eyewitness testimony. The trial court found Julian Valdez's testimony cumulative, lacking in credibility, and to be of little material value to defendant because much of it supported the State's case. The court found the alleged statements of Gilmar Pinelo to be inadmissible hearsay. While Valdez did testify regarding the victim's violence, that evidence is merely cumulative of other evidence presented at trial. *See Loose,* 2000 UT 11 at ¶ 16. Thus, it was not an abuse of discretion to refuse to grant a new trial based on the proffered testimony of Valdez and Pinelo.

Defendant also claims new evidence exists that the State waived payment of an additional $300 fine resulting from a DUI charge against witness Robert Young in exchange for Young's testimony. We agree with the trial court that the presentation of Young's failure to pay the fine would not have made a different result probable on retrial.

Next, defendant argues the trial court erred in not instructing the jury on the lesser-included offense of

manslaughter. Although defendant claims he submitted a requested instruction on manslaughter, our review of the record has uncovered no such request. The trial court found that defendant would have been entitled to the instruction if he had requested it, but he did not. Moreover, the trial court found, and our review of the record confirms, that his attorneys made no objection to the instructions as given. "Where no grounds are apparent from the text of the instruction and no objection is stated, the objection is presumed waived." *State v. Perdue,* 813 P.2d 1201, 1203 (Utah Ct.App.1991). However, "error may be assigned to instructions in order to avoid a manifest injustice." Utah R.Crim.P. 19(c); *see State v. Blubaugh,* 904 P.2d 688, 700 (Utah Ct.App.1995) (stating that "[b]ecause defendant failed to object to the instruction at trial, we can reach the issue only to avoid manifest injustice"); *cf. State v. Rudolph,* 970 P.2d 1221, 1226 (Utah 1998) (stating that "[w]hen reviewing a claim of manifest injustice, we generally use the same standard that is applied to determine whether plain error exists").

***2** In this case the record indicates that defendant considered requesting a manslaughter instruction, but decided against it. The trial court found this to be "appropriate trial tactics, and a reasonable gamble."

Because we agree with the trial court that the failure to request the manslaughter instruction was deliberate trial strategy, rather than egregious oversight, we conclude defendant has not demonstrated obvious error or manifest injustice. It is long settled that a defendant has a choice whether to seek a lesser-included instruction, and the court has no independent duty to give such an instruction if not requested. *See State v. Howell,* 649 P.2d 91, 94 (Utah 1992); *State v. Mitchell,* 278 P.2d 618, 621 (Utah 1955). Indeed, were we to find this strategic choice to fall under the plain error or manifest injustice doctrines, defendants in all cases could gamble that the jury would acquit, then appeal the failure to instruct as a manifest injustice should they lose. *See Howell,* 649 P.2d at 94; *State v. Valdez,* 432 P.2d 53, 54 (Utah 1967) (noting that "[h]aving made his choice, [defendant] is bound by it; and he cannot thus elect to make no request as to a lesser included offense, with a reservation in mind that if he is convicted he can claim error and obtain a new trial"). Accordingly, the trial court did not abuse its discretion in refusing to grant a new trial based on the failure to give a manslaughter instruction.

Third, defendant claims his trial counsel provided ineffective assistance because counsel failed to fully investigate the victim's gang involvement, the additional eyewitness testimony, and the alleged leniency to witness Young. To prevail on this claim, defendant "must show that his counsel's representation fell below an objective standard of reasonable conduct and that he was prejudiced thereby." *Bruner v. Carver,* 920 P.2d 1153, 1157 (Utah Ct.App.1996). Because we have determined that defendant would not have obtained a more favorable result in a new trial including this evidence, we conclude defendant was not prejudiced by trial counsel's treatment of these issues.

Defendant also claims ineffective assistance of counsel due to counsel's failure to request a lesser-included offense instruction on manslaughter. As discussed above, this failure to request the instruction was a reasonable trial strategy and does not constitute ineffective assistance. *See State v. Perry,* 899 P.2d 1232, 1241 (Utah Ct.App.1995). Similarly, counsel's failure to present mitigating evidence of defendant's possible mental illness was a reasonable strategy given the defense theory of self-defense. *See id.*

Next, defendant claims the State failed to provide him with exculpatory evidence, resulting in a violation of due process. Defendant must show that the prosecutor failed to disclose evidence favorable to the defense and that there is "a 'reasonable probability' that the result ... would have been different if the evidence had been disclosed." *State v. Bakalov,* 1999 UT 45, ¶ 39, 979 P.2d 799 (quoting *United States v. Bagley,* 473 U.S. 667, 682 (1985)). However, we have determined above that even had this evidence been presented, a different result on retrial would not be probable.

Therefore, defendant has failed to show his due process rights were violated.

***3** Finally, defendant claims there was insufficient evidence of his intent to kill the victim. To prevail in his challenge, defendant "must first marshal all the evidence supporting the ... verdict and then demonstrate how this evidence, even viewed in the most favorable light, is insufficient to support the verdict." *State v. Strain,* 885 P.2d 810, 819 (Utah Ct.App.1994). Defendant has failed to meet his burden to marshal the evidence and instead recites only selected evidence supporting his theory of self-defense. Thus, we need not consider whether the evidence was insufficient. *See State v. Hopkins,* 1999 UT 98, ¶ 16, 989 P.2d 1065. Moreover, our independent review of the record indicates that the jury did hear sufficient evidence upon which to base its guilty verdict. For example, witnesses testified that defendant retrieved his knife from storage on the morning of the stabbing in order to take care of a "problem" and that when defendant raised the knife after being hit by the victim, the victim backed away with his empty hands raised while defendant took several steps forward to stab him in the chest. This evidence is sufficient to support the verdict; therefore, defendant's challenge to the sufficiency of the evidence fails.

Accordingly, we affirm defendant's conviction.

GREENWOOD P.J., and ORME, J., concur.

Not Reported in P.3d, 2000 WL 33250560 (Utah App.), 2000 UT App 283

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